IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges: William B. Murphy, Richard Allen Griffin and Helene N. White

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CITY OF TAYLOR

Plaintiff/Appellee,

V

THE DETROIT EDISON COMPANY

Defendant/Appellant.

/

Supreme Court No. 127580

Court of Appeals No. 250648

Wayne County Circuit Court
Case No. 02-221723-CZ

REPLY BRIEF ON APPEAL - APPELLANT THE DETROIT EDISON COMPANY

*** * * ORAL ARGUMENT REQUESTED * * ***

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Dated: February 9, 2006

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Detroit Edison Company ("Edison") offers the following reply to the City of Taylor's ("City") brief. Edison relies on its initial brief, which addressed the issues in detail and which largely anticipated and addressed the City's arguments. Edison's position is further supported by amici curiae, including the Michigan Public Service Commission ("MPSC"). Edison's avoidance of repetition by not addressing all of the City's arguments in this reply should not be deemed to constitute an acceptance of any of the City's arguments.

ARGUMENT

I. THE DETERMINATION OF WHO PAYS TO REPLACE EXISTING OVERHEAD FACILITIES WITH UNDERGROUND FACILITIES IS NOT A MATTER OF LOCAL CONTROL OVER STREETS, BUT INSTEAD IS A MATTER OF UTILITY REGULATION UNDER STATE LAW.

The City claims a constitutional right to unrestricted control over its streets, and to promulgate ordinances that are beyond review by "the Courts, much less the MPSC" (brief, pp 45-46). The City's claimed right to operate above state regulation and beyond judicial review violates controlling law and the fundamental principles upon which the law is based. The City is not an independent city-state. Kalamazoo v Titus, 208 Mich 252, 261; 175 NW 480 (1919).

The City attempts to support its position with a discussion of the debate among delegates to the 1908 Constitutional Convention. The City focuses on comments that delegates made before amending proposed Const 1908, art 8, §28 to add the word "reasonable" to limit municipal control of streets. If the delegates' comments are relevant at all, the most pertinent comments were made in the context of the "reasonable" amendment. That discussion reflects concerns about a potential expansion of municipal control to a point of "home rule run mad." The delegates agreed that overbroad municipal control (which the City now advocates) would be unwise, and that the state's central authority should be preserved. Thus, the "reasonable" amendment was approved so that

home rule would not be extended too far. Constitutional Convention 1907-1908 Official Record, pp 1405-1406 (280b, 281b).

More significantly, the "rule of common understanding" provides that constitutional provisions are interpreted according to "the text's original meaning to the ratifiers, the people, at the time of ratification." Wayne County v Hathcock, 471 Mich 445, 468; 684 NW2d 765 (2005). The City acknowledges this standard (brief, p 27), and does not dispute the explanation to the people that the word "reasonable" was inserted to limit municipal authority, allowing municipalities to regulate only local conditions (see, Edison's initial brief, pp 10-11).

The City concedes that "reasonable" control means that a municipality can "recognize local and peculiar conditions" and can pass ordinances that are "not inconsistent with state law" and "which do not contravene state law" (brief, pp 22-23, quoting People v McGraw, 184 Mich 223, 238-39; 150 NW2d 836 (1915). The City further acknowledges that municipal regulation must not be "arbitrary, or unreasonable, or in conflict with state regulations" (brief, pp 50-51). Plainly, since there are state regulations promulgated by the MPSC requiring the City to pay for underground utility replacement, the City's Ordinance purporting to shift those costs from itself to Edison and its ratepayers conflicts with those regulations.

Nevertheless, the City boldly asserts that it has authority to regulate utility structures, including their placement and relocation in City streets (e.g., brief, pp 24, 35, 37-38). The City's assertion is overstated and inaccurate because utility structures are controlled by state regulations and engineering standards. See, for example, MAC R 460.813 (adopting relevant sections of the national electrical safety code as standards of accepted good practice). The City has no authority to deviate from such safety and engineering standards (see Edison's initial brief, p 27), just as it cannot "control" its streets by changing the color of traffic lights or dumping toxic waste down street drains.

Within the above limits, Edison does not dispute that the City may decide to have underground facilities. Edison regularly (subject to safety and other applicable considerations) works with such underground replacement requests. Underground utility replacements are also anticipated and expressly allowed under MPSC Rule 460.516(1)(27a), and the applicable Tariff (47a, 52a, 58a). The dispute in this appeal concerns who must pay for the cost of the City's underground utility replacement. Under the MPSC Rules and Tariff, the City must pay. The MPSC in its Electric Rules Order determined that utilities and their ratepayers should not bear the costs caused by those who want underground facilities for their own benefit, but rather the cost-causers must pay for those costs (19a-20a).

The City mischaracterizes the MPSC as invading the City's regulation. Instead, the MPSC issued its Electric Rules Order and adopted the controlling rules in 1970 (18a-27a). The present Tariff provisions were issued pursuant to MPSC orders in 1976 and 1990 (28a-45a; see Edison's initial brief, pp 22-23, n 14). The City enacted its Ordinance to invade the MPSC's regulation many years later, on May 16, 2000 (123a), just 12 days after Edison's letter advised the City that, pursuant to MPSC Rule 460.516, the City would have to pay to replace its existing overhead facilities with underground facilities (114a-15a). See also, Detroit Edison Co v Wixom, 382 Mich 673, 689; 172 NW2d 382 (1989) (holding that "hurriedly adopted" zoning ordinance was invalid, where the ordinance would have forced Edison to abandon its proposed electric transmission line).

The City acknowledges that the state has an overriding interest in setting utility rates (brief, p 16), and concedes that the "MPSC is authorized to set rates and, in doing so, exercises its authority over the terms and conditions under which the utility provides its services in exchange for payment of those rates" (brief, p 37). The City claims that its Ordinance does not affect rates, but instead only requires utilities to bear their "own costs" (brief, pp 16, 37). The City's claim is plainly wrong, and

unsupported by either citation or reasoned argument. It is axiomatic that public utilities such as Edison invest their private property to provide services to the public, and in return collect rates that recover the cost of that investment, plus a reasonable return on that investment.[1] Therefore, when utility costs increase, utility rates must similarly increase to cover those costs. The MPSC recognized this unavoidable fact when it issued its Electric Rules Order (19a-20a) as well as its Rules (27a) and Tariff provisions (47a, 52a, 58a) requiring customers and municipalities (the City is both) who request underground lines to pay the additional costs as compared to standard overhead facilities.

The City largely ignores cases concerning Const 1963, art 7, §29 and its predecessor, but instead focuses on common law and police power cases concerning the relocation (not removal and replacement) of utility facilities. None of those cases involved the MPSC's cost-allocation Rules and Tariff.[2] The City's repeated reliance on Detroit v Michigan Bell Telephone Co, 374 Mich 543; 132 NW2d 660 (1965) is particularly misleading, since it ignores that Detroit was not required to pay relocation costs under its stipulation with Edison and Michigan Bell. 374 Mich at 562. The case concerned statutory interpretation, and the Court held that the Plat Act, 1929 PA 172, and the Rehabilitation of Blighted Areas Act, 1945 PA 344, did not require a municipality to reserve

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[1] See generally, Bluefield Waterworks Improvement Co v Public Service Comm of West Virginia, 262 US 679, 690-694; 43 S Ct 675; 67 L Ed 1176 (1923); Federal Power Comm v Hope Natural Gas Co, 320 US 591, 603; 64 S Ct 281; 88 L Ed 333 (1944). See also, Permian Basin Area Rate Cases, 390 US 747, 769-70; 88 S Ct 1344; 20 L Ed 2d 312 (1968); FPC v Memphis Light, Gas and Water Division, 411 US 458; 43 S Ct 1723; 36 L Ed 2d 426 (1973); General Telephone Co v Public Service Comm, 341 Mich 620; 67 NW2d 882 (1954); Michigan Consolidated Gas Co v Public Service Comm, 389 Mich 624; 209 NW2d 210 (1973).

[2] The City cites only one Michigan case involving undergrounding. Monroe v Postal Telegraph Co, 195 Mich 467; 162 NW 76 (1917) is inapplicable because it predates the creation and empowerment of the MPSC in 1939, and the MPSC Rules enacted in 1970. Monroe also has not been cited as authority in any subsequent decisions by this or any other court.

easements in vacated streets and alleys. 374 Mich at 560. Subsequently, this Court decided the statutory interpretation case of City of Centerline v Michigan Bell Telephone Co, 387 Mich 260; 196 NW2d 144 (1972), holding that the city was required to reimburse the utility "for costs for removal and relocation of its equipment necessitated by implementation of an urban renewal plan". 387 Mich 266. This Court's focus on statutory interpretation is significant because the Legislature enacts statutes. Once the Legislature enacts a statute (such as those creating and empowering the MPSC), then state law is controlling. The MPSC's Rules and Tariff provisions concerning the rates, terms and conditions for undergrounding are unchallenged, and even if they were, then they would still be in force and prima facie "lawful and reasonable." MCL 462.25. Therefore, the City's contrary ordinance is both unreasonable and preempted by state law.[3]

The MPSC's Rules and Tariff provisions establish what is reasonable, and bind both Edison and the City. Edison installed standard overhead facilities in the City, and its ratepayers paid for those facilities. Now, the City can decide to remove those facilities and replace them with underground facilities; however, pursuant to the controlling MPSC Rules and Tariff, the City cannot force Edison and its ratepayers to pay for this expensive and duplicative project. See, City of Allen v Public Utility Comm, 161 SW2d 195, 206-207, 209 (Tex App, 2005) (rejecting municipality's

[3] This also suggests another reason why the "governmental/proprietary" test does not apply here (beyond those previously discussed in Edison's initial brief, pp 25, 28). The test seeks to apply a tort concept, essentially providing a governmental immunity defense to a municipality that is sued by a utility. This is not a utility vs. municipality case, however. The City sued Edison, but the City's real dispute is with the MPSC (which the City purposely avoided despite the primary jurisdiction doctrine, discussed in Edison's initial brief, pp 36-49). The "governmental purpose" defense lacks relevance when the real dispute is between state and local governments.

purported exercise of police power to reduce the amount of compensation that a utility would recover for an underground installation to zero, and shifting that expense to the utility's customers).[4]

This case is also beyond the City's "reasonable" control of its streets, or lawful use of the police power, because there was nothing defective, dangerous or unsafe with Edison's overhead facilities, which were fully-compliant facilities that were installed in accordance with the well-established, safe, reliable and economical provision of electric service. The City acknowledges that it "raised no issue concerning the adequacy of Edison's equipment, facilities, or services" (brief, p 58). The City cannot force Edison to abandon its well-functioning overhead system and instead build a new underground system. In Detroit Edison Co, supra, this Court recognized that zoning is permissible, but held that Wixom's zoning ordinance was invalid. The Court explained that if Edison had to comply with the zoning ordinance, then Edison would be "forced to abandon" its electric transmission line, and Edison's property would be rendered virtually worthless. 382 Mich at 389.

The City attempts to support its Ordinance by asserting that it had concerns about health, safety and welfare. There was not even an arguable reason to move the utility poles (let alone remove and replace them), to make way to install a sewer or move a road. Instead, the City wanted utility facilities in the same location, just underground. The City concedes that Edison was correct about the City being driven by aesthetic concerns, but asserts that it was also concerned about utility

[4] The City's assertion of broad control without regard to the MPSC or review by the Courts also goes beyond the wasteful duplication in this case. Instead, if the next City Council does not like underground facilities, then that Council could order the underground facilities to be removed and replaced with overhead facilities. There is no limit to what the City can demand - or how much Edison and its ratepayers must pay - under the City's position.

poles being involved in traffic accidents (brief, p 29). The City's assertion is not credible.[5] Edison's utility poles (with attached street lights) were also replaced with decorative street lighting poles (126a, 171a), so the potential for traffic accidents involving poles still exists. Courts see through such attempts by municipalities to justify their invalid acts. For example, in Detroit Edison Co, supra, the majority held that a zoning ordinance was invalid, explaining that "the very nature of the ordinance" indicates that it bears no substantial relationship to public health, safety, morals or general welfare, but instead the ordinance was driven by aesthetics. 382 Mich at 691. The majority further explained that "aesthetics may be a valid consideration; but such consideration must be merely an incident and not the moving factor . . . we cannot sustain the ordinance for purely aesthetic reasons or unsupported fears of the City planners." 382 Mich at 692.[6]

The City does not improve its position by relying on non-Michigan cases, such as City of Auburn v Quest Communications, 260 F3d 1160, 1169 (CA 9, 2001), since even that Court recognized that "it would be absurd for a city to be able, by ordinance, to exempt itself from a prior Tariff that was validly enacted and authorized by legislation." The City of Auburn Court made this statement in the context a discussion explaining that the decision "makes perfect sense" in the analogous case of General Telephone Co v Bothell, 716 P2d 879 (Wash, 1986) (holding that city ordinances requiring the underground replacement of utility facilities at the utilities' expense were

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[5] Using the City's own statistics, there allegedly were an average of 700 traffic accidents per year on Telegraph Road in the City from 1995-2000 (3b, ¶7), with poles being involved in only 4.2 of those accidents per year (117b-121b). Thus, only 0.6% of the accidents involved poles. The data also reflects a declining trend of accidents involving poles, with 3 in 1998 and 2 in 1999 (120b-121b). The data does not support any serious safety problem with poles and traffic accidents. Moreover, the City obtained the data on or after August 16, 2000 (117b-121b), plainly in a post hoc attempt to rationalize and support the City's May 16, 2000 Ordinance (123a).

[6] Even if the City's concern about street safety were credible, it could not remedy the City's invalid attempt to impose costs to address the safety concern. For example, although the City may decide

"null and void" because they contradicted a tariff and regulation requiring the party requesting the underground replacement to bear that expense; discussed and quoted at length in Edison's initial brief, p 32).

The City's reliance on US West Communications v City of Longmont, 948 P2d 509 (Colo, 1997) is misplaced because the ordinance there, among other things, included an option to reroute overhead lines, and allowed the utility to charge the benefiting customers for the underground replacement of utility facilities. Id, at 513. Here, in contrast, the Ordinance demands undergrounding, and the Ordinance requires Edison and its ratepayers to pay for the removal of the overhead facilities and their replacement with underground facilities.

CONCLUSION

The City's "reasonable control" over its streets is limited to matters of local concern. Subject to safety and engineering requirements, Edison does not dispute that the City may lawfully decide to remove overhead utility facilities and replace them with underground facilities. Edison works with such requests, and the MPSC's Rules and Tariff provisions address them, but this case concerns who must pay for the City's decision. The MPSC has broad authority over the rates, terms and conditions of utility service. Pursuant to this authority, the MPSC sets utility rates based on standard overhead

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that street lights would improve the safety of Telegraph Road, the City cannot make Edison and its ratepayers pay for those street lights or the electricity to run them.

facilities. The MPSC also established Rules and Tariff provisions requiring that those who want a utility to replace overhead facilities with underground facilities must pay for this expensive and duplicative endeavor. The City's reasonable local control does not include the ability to shift its own undergrounding costs to Edison and its customers.

Respectfully submitted,

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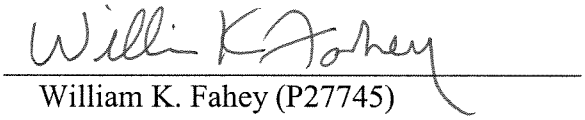
Dated: February 9, 2006

By: 

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